Filed 9/14/15 Bretches v. OneWest Bank CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| DENNIS L. BRETCHES, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>ONEWEST BANK, et al.,<br><br>Defendants and Respondents. | B257013<br><br>(Los Angeles County<br>Super. Ct. No. MC021928) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian C. Yep, Judge. Affirmed.

Law Offices of Lenore Albert and Lenore L. Albert, for Plaintiffs and Appellants.

Shumener, Odson & Oh, Robert J. Odson and Staci M. Tomita, for Defendants and Respondents.

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Dennis and Lucinda Bretches filed an action alleging that OneWest Bank and its related entities had breached the terms of the parties' lending agreement, causing the Bretcheses to default on their loan. During the litigation, defendants served requests for admissions to which plaintiffs failed to serve a timely response. The trial court, on defendant's motion, entered an order deeming the matters specified in the requests to be admitted. The defendants then filed a motion for summary judgment arguing that the plaintiffs' deemed admissions conclusively established they had no facts or evidence to support their claims, which the trial court granted. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Summary of Plaintiffs' Complaint*

On September 10, 2010, Dennis and Lucinda Bretches filed a complaint against OneWest Bank, IndyMac Mortgage Services and IndyMac Venture (collectively defendants) arising out of the foreclosure of their home. The operative third amended complaint, filed in May of 2013,[1] alleged that plaintiffs had entered into a loan agreement with defendants to finance the construction of a residence on unimproved property located in Pearblossom, California. Early in 2009, the plaintiffs "suffered losses by theft at the [p]roperty. [¶] Pursuant to the terms of the [loan agreement], [plaintiffs] filed an insurance claim for $15,000.00 with [their insurer]. [¶] [The insurer] paid the claim but forwarded the check to [defendants] who had to endorse the check in addition to [p]laintiffs. [Defendants], however, withheld endorsement on the claim check for an unreasonable time after receiving the check from [the insurer], unjustifiably demanding not only receipts from [p]laintiffs to prove that the stolen items had been replaced; but

[1] In *Bretches v. OneWest Bank* (Dec. 19, 2012, B238686) [nonpub. opn.], we reversed a judgment of dismissal the trial court had entered after sustaining a demurrer to the Bretches's second amended complaint without leave to amend. In the prior appeal, we concluded plaintiffs had demonstrated a reasonable possibility that they could cure the defects in their pleading through amendment. (See generally *Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 876 ["'In the case of . . . a demurrer . . ., leave to amend should be granted if there is any reasonable possibility that the plaintiff can state a good cause of action'"].)

also that the stolen items had actually been installed at the [p]roperty." Although plaintiffs complied with these demands, the defendants still refused to endorse the check, which "forced [p]laintiffs to advance an additional $15,000 of their own funds to cover the $15,000 in theft losses. . . This caused [p]laintiffs to run out of cash, which in turn, made it impossible for them to afford their interest payments under the [loan agreement] . . . . [¶] By the time [defendants] finally endorsed the check and made the funds available to plaintiffs, . . . [they] were several months behind in payments." Plaintiffs also alleged defendants had "incorrectly assessed [many charges] to the [the] account, which caused the construction funds to become exhausted far sooner than they should have been."

On September 1, 2010, defendants recorded a notice of default and election to sell the property. Although the notice contained a "phone number to contact . . . OneWest[,] that phone number was invalid, . . . leaving . . . [plaintiffs] no one to speak . . . to in regards to the contents of the [n]otice." Plaintiffs "repeatedly attempted to work out a loan mediation or other arrangement with [defendants], to no avail." On March 4, 2011, the defendants "recorded a notice of trustee's sale," placing plaintiffs "at risk of losing the [p]roperty."

The complaint alleged three causes of action: breach of contract; conversion; and unfair business practices in violation of Business and Professions Code section 17200. In their breach of contract claim, plaintiffs alleged defendants had "breached the terms of the [lending] agreement by, among other things: (1) failing to properly credit principal and interest payments before September 2009 and November 2009; (2) improperly and/or inaccurately assessing charges to the loan account in November of 2009; [and] (3) failing to timely endorse an insurance reimbursement check due to plaintiffs in the amount of $15,000." Plaintiffs contended that, "as a result of the [d]efendants' material breach, . . . [p]laintiffs [were forced] to expend funds they would not have otherwise been required to spend, thereby causing them to default on their obligation which resulted in financial damage and led to a nonjudicial foreclosure."

In their conversion claim, plaintiffs alleged defendants had "wrongfully exercised dominion and control of the $15,000 insurance payment when they continued to withhold the funds for their own benefit even after [p]laintiffs had fulfilled all of the requirements under the [c]onstruction [l]oan." Plaintiffs also alleged defendants had unlawfully converted their property by "intentionally overcharg[ing] plaintiffs[']s loan account over $16,000[] between September and November 2009, by charging [p]laintiffs double payments and other improper fees, which deprive[d] [p]laintiffs of access to $17,787.49 in loans funds."

Finally, plaintiffs' section 17200 claim alleged that the wrongful conduct described in the first two causes of action was part of a "systemic[]" business practice whereby defendants "withhold[] funds and interest owed to their borrowers." Plaintiffs further alleged defendants had violated section 17200 by listing a nonfunctioning telephone number on the notice of default and using an incorrect address to describe the plaintiffs' property on several business records.

### *B. Defendants' Requests for Admissions*

On August 1, 2013, defendants served a set of 21 requests for admissions (RFAs) asking plaintiffs to admit they had no evidence to support each of the material factual allegations pleaded in support of their claims. More specifically, the defendants requested that plaintiffs admit they had no evidence to prove each of the following allegations: "incorrect charges were assessed to [their] account" (RFA no. 1); "[their] default on the [loan] was caused by a delay in returning the $15,000 insurance proceeds" (RFA no. 6); "[defendants] failed to properly credit principal and interests payments made by [plaintiffs] between September 2009 and November 2009" (RFA no. 7); "[defendants] improperly and/or inaccurately assessed charges to [the plaintiffs'] loan account in November of 2009" (RFA no. 8); "[defendants] systematically breach[ed]

their lender agreements by withholding funds and interest owed to borrowers" (RFA no. 11); and "the telephone number in the [notice of default] was invalid" (RFA no. 5).[2]

After plaintiffs failed to respond to the RFAs, defendants filed a motion pursuant to Code of Civil Procedure section 2033.280 seeking an order that the matters specified in the RFAs be deemed admitted.[3] In support of the motion, defendants filed a declaration from their attorney that included a copy of the RFAs, a proof of service demonstrating service on plaintiffs on August 1, 2013 and copies of emails defendants had sent to opposing counsel on September 4th and 5th requesting a response to the RFAs. Defendants argued that under the procedures set forth in section 2033.280,[4] they were entitled an order deeming the RFAs admitted because plaintiffs had failed to serve a response within 30 days after the discovery was served on them. (See § 2033.250, subd. (a) ["Within 30 days after service of requests for admission, the party to whom the requests are directed shall serve the original of the response to them on the requesting party"].) The plaintiffs did not file an opposition to the motion.

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[2] The RFAs also requested that plaintiffs admit the foreclosure documents contained a correct legal description of plaintiffs' property (RFA no. 13) and that plaintiffs had "no facts to support" its first, second or third causes of action (RFAs nos. 19, 20 and 21).

[3] Section 2033.280 states, in relevant part: "If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply: [¶] . . . [¶] (b) The requesting party may move for an order that . . . the truth of any matters specified in the requests be deemed admitted . . . . [¶]. (c) The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. . . ."

[4] Unless otherwise noted, all further statutory citations are to the Code of Civil Procedure.

The trial court heard the motion on October 22, 2013 (the section 2033.280 hearing). Following the hearing, the court granted the defendants' motion and entered an order directing that "[t]he [RFAs] are deemed admitted."[5]

***C. Defendants' Motion for Summary Judgment***

On December 19, 2013, defendants filed a motion for summary judgment arguing that plaintiffs' deemed admissions conclusively demonstrated they could not prove any of the claims set forth in their complaint. Defendants noted that although "it ha[d] been nearly two months since the [section 2033.280] hearing, plaintiffs ha[d] not taken any steps to obtain leave of Court to amend or withdraw their admissions." (See § 2033.300, subd. (a) ["A party may withdraw or amend an admission made in response to a request for admission . . . on leave of court granted after notice to all parties"].)[6]

At the motion hearing, the court informed the parties that its tentative ruling "would be to grant the motion for summary judgment . . . . based on the previously granted motion by the defendants to have [their] request[s] for admissions deemed admitted." The court explained that the "[deemed] admissions . . . essentially prove up the motion for summary judgment and are the basis for the Court's ruling [that] there are no triable issues of material fact."

Plaintiffs' counsel argued there were three reasons the court should not rely on the deemed admissions in granting the motion for summary judgment. First, counsel asserted that defendants' RFAs violated federal prohibitions against abusive, deceptive and unfair debt collection practices set forth in the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. §§ 1692, *et seq.*) In support, counsel cited *McCollough v. Johnson, Rodenburg &*

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**5** The record does not contain a transcript of the section 2033.280 hearing nor does it contain any evidence that plaintiffs attempted to serve a response to the RFAs before or during the hearing.

**6** Although the record contains copies of documents the plaintiffs filed in support of their opposition to the motion for summary judgment, it does not contain a copy of the opposition brief. As a result, we cannot determine what arguments plaintiffs raised in the opposition.

*Lauinger, LLC* (9th Cir. 2011) 637 F.3d 939 (*McCollough*), which held that a debt collection company had violated the FDCPA by serving requests for admissions that the company knew to be untrue. Counsel argued that, under *McCollough* and the FDCPA, the defendants' RFAs were "void" because defendants knew that plaintiffs contested each of the facts set forth in the requests.

Second, counsel argued that the court should not deem the RFAs to be admitted because plaintiffs had in fact provided a response to the requests prior to the section 2033.280 hearing. According to counsel, "the only thing that the defendant did not receive [prior to the section 2033.280 hearing] was the original signature page of the verification by the plaintiff, which were on their way." Third, counsel argued that even if the RFAs were properly deemed admitted, plaintiffs had provided "deposition testimony that contradicts . . . those admissions," thereby raising a triable issue of fact on each issue set forth in the RFAs.

The trial court rejected each argument. First, it explained that plaintiffs had failed to establish the applicability of the FDCPA because they had provided no evidence the "defendant . . . bank [qualified] as a debt collector." Second, the court noted that plaintiffs could have sought "a motion to be . . . relieved of the [deemed] admissions" (see § 2033.300), but had failed to do so. Third, the court explained that "under California law, the request for admissions are dispositive of the fact that [i]s the subject of the request for admission, and so it doesn't matter whether there's other declarations, deposition testimony, other written discovery responses which contradict it."

The court then adopted its tentative ruling as its final ruling, clarifying that its decision was "again . . . based on the previously granted motion deeming request for admission propounded by the defendant admitted." On April 17, 2014, the court entered judgment in favor of defendants. Plaintiffs filed a notice of appeal on June 13, 2014.

### *D. Postjudment Order Granting Defendants' Motion for Attorney's Fees*

After the judgment was entered, defendants filed a motion for attorney's fees and costs based on a provision in the deed of trust requiring the borrower to pay the lender the

amount of any expenses, "including the fees and disbursements of [l]ender's legal counsel[,] . . . which [the l]ender may incur in connection with . . . the exercise of and/or enforcement of any of the rights of [l]ender under this [s]ecurity [i]nstrument." Defendants argued they were the "prevailing party" within the meaning of Civil Code section 1717[7] because the court had granted their motion for summary judgment "and entered [j]udgment in [their] favor." Defendants' motion claimed $253,787.80 in fees.

In opposition, plaintiffs argued that "under California's anti-deficiency statute," defendants' decision to foreclose on the property precluded them from seeking any form of "recovery on the debt, including attorney's fees or costs in this litigation." Plaintiffs also challenged the amount of the requested fees, asserting that defendants had failed to show their fees were "reasonable" or "necessary to conduct the litigation."

On July 31, 2014, the court entered an order awarding defendants $60,000 in attorney's fees and approximately $4,600 in costs. Plaintiffs did not appeal that order.

## DISCUSSION

### *A. Standard of Review*

"'A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citation.]'" (*Hypertouch, Inc. v. ValueClick, Inc*. (2011) 192 Cal.App.4th 805, 817.) "'Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action. . . .' [Citations.] The party opposing summary judgment 'may not rely upon the mere allegations or denials of its pleadings,' but rather 'shall set forth the specific facts showing that a triable issue of

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[7] Civil Code section 1717 states, in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

material fact exists. . . .' [Citations.] A triable issue of material fact exists where 'the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]." (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc*. (2014) 229 Cal.App.4th 635, 643.)

"'We review an order granting or denying summary adjudication de novo. [Citation.]" (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1233.) However, in conducting our review, we "presume[] [the trial court's] judgment is correct. [Citation.] The appellant has the burden of demonstrating prejudicial error based on an adequate record and appropriate legal argument. [Citations.]" (*Contra Costa County v. Pinole Point Properties, LLC* (2015) 235 Cal.App.4th 914, 925.)

### *B. Defendants Are Entitled to Judgment Based on the Plaintiffs' Deemed Admissions*

Plaintiffs do not dispute that if the matters specified in the defendants' RFAs were properly deemed admitted and uncontradicted by other evidence in the record, those admissions would entitle defendants to summary judgment. Plaintiffs contend, however, that there are three reasons the trial court erred in relying on the admissions in granting summary judgment. First, plaintiffs contend the court should not have entered an order deeming the RFAs admitted because they provided a response to the defendants' requests prior to the section 2033.280 hearing. Second, plaintiffs argue that the FDCPA precluded the court from considering the defendants' RFAs or deeming those requests to be admitted. Third, they argue that even if the court properly deemed the RFAs to be admitted, the deemed admissions are contradicted by other evidence in the record, giving rise to various disputed issues of material fact.

#### *1. Summary of statutes governing requests for admission*

Section 2033.010 provides that "[a]ny party may obtain discovery . . . by a written request that any other party to the action admit the . . . truth of specified matters of fact, opinion relating to fact, or application of law to fact. A request for admission may relate

to a matter that is in controversy between the parties." The party to whom the requests are directed must serve a response within 30 days after the requests were served. (§ 2033.250.) The response must be "in writing under oath" and "separately" address "each request." (§ 2033.210, subd. (a).) Each response must "answer the substance of the requested admission, or set forth an objection to the particular request." (§ 2033.210, subd. (b).)

Under section 2033.280, "a propounding party who fails to receive a timely response may move for an order that 'matters specified in the requests' are deemed admitted. The nonresponding party can avoid the deemed admitted order by serving a verified response before the hearing on the motion. [Citation.] The failure to do so, however, results in automatic entry of the order. [Citation.]" (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 978 (*Wilcox*) [discussing identically-worded predecessor to § 2033.280].)

Section 2033.300, however, provides a mechanism for withdrawing or amending admissions: "A party may withdraw or amend an admission made in response to a request for admission . . . on leave of court granted after notice to all parties . . . [¶] The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits." Although section 2033.300 refers only to withdrawal or amendment of admissions "made in response to a request for admission," our Supreme Court has clarified that this section also permits parties to seek withdrawal or amendment of "deemed admissions" resulting from a failure to respond to an RFA. (See *Wilcox, supra,* 21 Cal.4th at p. 979 [interpreting identically-worded predecessor to § 2033.300].)

Section 2033.410 "defines the effect of an admission and provides that '[a]ny matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under [section 2033.300].' [Citation.]"

(*Wilcox, supra,* 21 Cal.4th at p. 979) In enacting section 2033.410, the Legislature intended to "codif[y] . . . [prior] case law . . . hold[ing] that matters admitted in an actual response or deemed admitted for failure to respond constitute binding judicial admissions." (*Id.* at p. 979 [discussing identically-worded predecessor to § 2033.410].) Thus, "[a]bsent leave of court to amend or withdraw the admission, no contradictory evidence may be introduced [on the matter specified in the admission]." (*Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 736 (*Murillo*).)

*2. The record contains no evidence that plaintiffs served a response to the RFAs*

Plaintiffs initially contend that "the court's [summary judgment] ruling was erroneous, because [plaintiffs] submitted . . . responses to the [RFAs] before the [section 2033.280] hearing." Plaintiffs' appellate brief describes the content of their alleged responses, which they claim to have served on defendants the day before the section 2033.280 hearing. Plaintiffs further contend that although they presented these responses to the court during the section 2033.280 hearing, the court concluded the responses were insufficient because they did not include a verification page.

Plaintiffs have cited no evidence in the record demonstrating that they served a response to the RFAs prior to the section 2033.280 hearing. Indeed, plaintiffs admit the responses they refer to in their appellate brief "were never made part of the trial record."[8] "As a general rule, documents not before the trial court cannot be included as part of the

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**8** Plaintiffs' concession that their responses to the RFAs were not made part of the trial court record appears in a motion they filed in this court requesting that we augment the appellate record to add their responses to the RFAs or, alternatively, that we take judicial notice of the responses. We denied the motion. (See generally *Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, n. 3 ["Augmentation does not function to supplement the record with materials not before the trial court. [Citations.] Reviewing courts generally do not take judicial notice of evidence not presented to the trial court"]; *Estate of Hobart* (1947) 82 Cal.App.2d 502, 510 ["Augmentation of the record is permitted only when an exhibit has been actually 'on file in or lodged with the superior court'"]; Cal. Rules of Court, Rule 8.155.)

record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.] Likewise disregarded are statements in briefs based on matters [not] included in the record." (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.) Accordingly, based on the record before us, there is no evidence we can consider that supports plaintiffs' assertion they served a response to the defendants' RFAs.

Plaintiffs have also presented no evidence that they presented their responses to the trial court during the section 2033.280 hearing or that the trial court rejected those responses based on the lack of a verification page. The only materials in the record regarding the section 2033.280 hearing consist of the defendants' motion for an order deeming the RFAs to be admitted, several documents the defendants filed in support of the motion (including a notice of plaintiffs' non-opposition) and the trial court's order granting the motion. There is no transcript of the hearing nor any other materials explaining the basis for the court's order. "It is a fundamental principle of appellate review that we presume that a judgment or order is correct. [Citations.] . . . [I]t is the appellant's burden of providing a record that establishes error, and where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271.) Because the record contains no evidence that plaintiffs served a response to the RFAs prior to the section 2033.280 hearing or any other information explaining the basis of the court's ruling, we must presume the court correctly deemed the responses to be admitted in accordance with the procedures set forth in section 2033.280.

Moreover, if the plaintiffs believed the court had erred in ordering the RFAs admitted at the section 2033.280 hearing, they could have filed a motion to withdraw the deemed admissions under the procedures set forth in section 2033.300. Our courts have liberally construed this provision, concluding that withdrawal is generally appropriate absent "inexcusable" neglect. (See *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420-1421 ["Because the law strongly favors trial and disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking relief. Accordingly, the court's discretion to deny a motion under the statute is

limited to circumstances where it is clear that the mistake, inadvertence, or neglect was inexcusable, or where it is clear that the withdrawal or amendment would substantially prejudice the party who obtained the admission in maintaining that party's action or defense on the merits"].) Plaintiffs have not demonstrated that they attempted to seek such relief at any point in the proceedings.

*3. Plaintiffs failed to demonstrate the FDCPA "preempted" the trial court from relying on the plaintiffs' deemed admissions*

Plaintiffs also argue we should reverse the trial court's judgment because "[t]here was a material issue of whether" the FDCPA "preempt[ed]" the court from relying on the deemed admissions in granting summary judgment. According to plaintiffs, the FDCPA has been interpreted to prohibit debt collectors from "us[ing] written discovery in an abusive manner in an attempt to collect a debt." They further contend that the defendants' RFAs were "abusive" because they sought admission of matters that defendants knew to be untrue.

In support of these arguments, plaintiffs cite *McCollough, supra,* 637 F.3d 939, which held that a debt collector had violated the FDCPA by serving "requests for admission" upon a pro se defendant that: (1) "asked the [debtor] to admit facts that [the debt collector knew] were not true"; and (2) did not include an explanation that, under Montana law, the requests would be deemed admitted if not responded to within 30 days. The Ninth Circuit concluded that "the service of requests for admission containing false information upon a pro se defendant without an explanation that the requests would be deemed admitted after thirty days constitutes 'unfair or unconscionable' or 'false, deceptive, or misleading' means to collect a debt." (*Id*. at p. 952.) In reaching its holding, the court rejected the debt collector's assertion that improper discovery techniques should be remedied through "[state] court rules for civil procedure" rather than through "liability under the FDCPA." (*Id*. at p. 951.) The court explained that Congress had "enacted the FDCPA expressly because prior laws for redressing 'abusive, deceptive, and unfair debt collection practices' were 'inadequate to protect consumers.'

[Citation.] The statute preempts state laws 'to the extent that those laws are inconsistent with any provision of [the FDCPA].' [Citation.]" (*Ibid*.)

Plaintiffs have failed to establish that the defendants' discovery requests are subject to the prohibitions set forth in the FDCPA. To demonstrate a violation of the FDCPA, the moving party must show (among other things) that: (1) the defendant is a "debt collector" within the meaning of the statute; and (2) the defendant committed some act or omission in violation of the FDCPA. (See *Robinson v. Managed Accounts Receivables Corp*. (C.D. Cal. 2009) 654 F.Supp.2d 1051, 1057.) As the trial court noted at the summary judgment hearing, plaintiffs have provided no evidence that defendants qualify as "debt collectors," who are statutorily-defined "as 'any person[s] who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.' § 1692a(6)." (*Harris v. Liberty Community Management, Inc*. (11th Cir. 2011) 702 F.3d 1298, 1302.) Accordingly, they have failed to show the FDCPA "preempted" the court from considering the RFAs or deeming them admitted. (See *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088 ["It is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating"].)

*4. Plaintiffs' deemed admissions are conclusive as to the matters admitted*

Finally, plaintiffs argue that even if the trial court properly deemed each of the matters specified in the RFAs to be admitted, the admissions are contradicted by statements that Lucinda Bretches made during deposition testimony. According to plaintiffs, Bretches's conflicting deposition testimony is sufficient to create a triable issue of fact on each of the matters specified in the RFAs.

This argument is foreclosed by section 2033.410, which states that "[a]ny matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under [section 2033.300]." Our Supreme

Court has explained that this section applies regardless of whether the "matter [was] admitted in an actual response [to an RFA] or deemed admitted for failure to respond." (*Wilcox, supra,* 21 Cal.4th at p. 979.) Under section 2033.410, plaintiffs could not submit, and the trial court could not consider, any evidence contradicting the matters that had been deemed admitted. (See *Murillo, supra,* 143 Cal.App.4th at p. 736 ["[a]bsent leave of court to amend or withdraw the admission, no contradictory evidence may be introduced"]; *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 260 ["while courts may utilize evidence to elucidate and explain an admission, they cannot use such evidence to contradict the plain meaning of a response to a request for admissions"].)

Plaintiffs disagree, contending that *Scalf v. D.B. Log Homes, Inc*. (2005) 128 Cal.App.4th 1510 (*Scalf*) and other cases have recognized that "when there are two discovery devices like a [d]eposition and a later declaration, so long as the declaration explains the deposition testimony, the later declaration is not discounted merely because it may contradict prior deposition testimony." Plaintiffs assert that, applying the rule here, the trial court should have considered Bretches's deposition testimony even if it conflicted with the matters that were deemed to be admitted.

*Scalf* and the other cases plaintiffs cite do not concern admissions made in response to an RFA. (See *Scalf, supra,* 128 Cal.App.4th at p. 1522 ["[f]or summary judgment purposes, deposition answers are simply evidence . . . [that is to be] considered and weighed in conjunction with other evidence"].) Indeed, *Scalf* emphasized the distinction between these two forms of "admissions," explaining that statements made in "deposition answers do not constitute incontrovertible judicial admissions as do, for example, . . . . answers to requests for admissions, which are specifically designed to pare down disputed issues in a lawsuit." (*Id*. at p. 1522.)

### *C. We Lack Jurisdiction to Review the Trial Court's Order Awarding Attorney's Fees*

The plaintiffs also seek review of the trial court's order awarding defendants attorney's fees pursuant to a contractual provision in the deed of trust. Plaintiffs argue

that the trial court erred in finding defendants were the "prevailing party" within the meaning of Civil Code section 1717 because the "judgment [was entered] in favor of [defendants] on a mere technicality. [Defendants] won because their 'admissions' were deemed admitted." Plaintiffs also argue that the amount the court awarded to defendants was unreasonable.

Although plaintiffs filed a notice of appeal of the trial court's judgment, they did not file a separate notice of appeal of the court's subsequent order awarding attorney's fees and costs. As defendants correctly note in their respondent's brief, the general rule is that "'[a]n appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed.' [Citation.]" (*Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171.) "A postjudgment order which awards or denies costs or attorney's fees is separately appealable [citations], and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it." (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46].) Our courts have recognized an exception to this rule where the "judgment adjudicated entitlement to attorney fees," but "provides for the later determination of the amounts" of those fees. (*Silver v. Pacific American Fish Co., Inc*. (2010) 190 Cal.App.4th 688, 691-692 (*Silver*); see also *R.P. Richards, Inc. v. Chartered Construction Corp*. (1990) 83 Cal.App.4th 146, 158 ["when the judgment awards attorney fees but does not determine the amount, the judgment is deemed to subsume the postjudgment order determining the amount awarded, and an appeal from the judgment encompasses the postjudgment order"].) This exception is inapplicable where "it is clear that the parties . . . litigated in a separate postjudgment proceeding not only the reasonableness of the amount of the attorney fees [the moving party] was claiming, but also the threshold issue of [the moving party's] entitlement to such fees." (*Silver, supra*, 190 Cal.App.4th. at p. 692.)

The trial court's judgment does not determine whether defendants were entitled to attorney's fees or costs. Rather, it states only that defendants shall "recover attorney's fees and costs in accordance with the [Code of Civil Procedure]." This statement merely

served to reserve the court's jurisdiction to make such an award in a subsequent postjudgment proceeding. Indeed, at the time the trial court entered its judgment, it had no basis to award defendants fees because none had been requested. The defendants did not file the motion and supporting materials until June 20, 2014, after the date on which the court entered judgment. Plaintiffs' opposition, which argued that California's "antideficiency statute[s]" barred defendants from recovering such fees, was filed on July 18, 2014. The court's order awarding fees was filed July 31, 2014.

The record therefore makes clear that "the issue of whether [defendants] w[ere] entitled to an award of fees was deferred until after judgment and litigated in a separate postjudgment proceeding that resulted in a determination and order in [defendants'] favor." (*Silver, supra,* 190 Cal.App.4th at p. 694.) Plaintiffs were therefore "required to file a separate, timely notice of appeal. [Their] failure to do so deprives this court of jurisdiction over [any] purported appeal from that order and mandates dismissal of that portion of his appeal." (*Ibid*.)

**DISPOSITION**

The judgment is affirmed. Appellants' appeal from the order awarding attorney's fees and costs is dismissed for lack of jurisdiction. Respondents shall recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J. SEGAL, J.